NO. COA09-1533

NORTH CAROLINA COURT OF APPEALS

Filed: 21 September 2010

STATE OF NORTH CAROLINA

v. Yancey County
No. 06 CrS 50759-50762

GARY ALLEN LEE

Appeal by defendant from judgment entered 4 June 2009 by Judge James L. Baker in Yancey County Superior Court. Heard in the Court of Appeals 15 April 2009.

Attorney General Roy Cooper, by Assistant Attorney General Mary Carla Hollis, for State.

Michael E. Casterline, for defendant.

ERVIN, Judge.

Defendant Gary Allen Lee appeals from judgments imposed by the trial court sentencing him to a minimum of 384 months and a maximum of 470 months in the custody of the North Carolina Department of Correction based on jury verdicts convicting him of first degree rape of a child and first degree sexual offense against a child, to a consecutive term of a minimum of 384 months and a maximum of 470 months imprisonment in the custody of the North Carolina Department of Correction based upon a jury verdict convicting him of incest with a child under the age of thirteen, and to a consecutive sentence of a minimum of 25 months and a maximum of 30 months

imprisonment in the custody of the North Carolina Department of Correction based upon a jury verdict convicting him of taking indecent liberties with a child. After careful consideration of Defendant's challenge to the trial court's judgments in light of the record and the applicable law, we conclude that, because Defendant failed to properly preserve this issue for appellate review, he is not entitled to any relief on appeal.

I. Factual Background

A. Substantive Facts

T.N.L. (Teresa)[1] lived in Mitchell County, North Carolina with her mother, stepfather, and half-brother. Defendant was Teresa's father. After not having seen Defendant for eight years, Teresa initiated contact with him when she was eleven years old. Before contacting Defendant, Teresa felt as if "something was missing in her life." After reconnecting with Defendant, Teresa felt happy because she loved him and considered him an important part of her life.

Teresa's initial contact with Defendant took the form of letters, by means of which Defendant and Teresa discussed her schooling and general well-being. The two corresponded by letter and telephone for approximately one year without any inappropriate conduct by Defendant.

Around Christmas 2005, Teresa met Defendant in person. Much to Teresa's excitement, her mother dropped her off at Defendant's

[1] "Teresa" is a pseudonym that will be used throughout the remainder of this opinion for ease of reading and to protect the child's privacy.

mother's home in Yancey County and allowed her to visit with Defendant for a few hours. Approximately one-and-a half to two months later, Teresa began visiting Defendant at his mother's house during the day. Prior to the incident that led to Defendant's convictions, Teresa had spent the night with Defendant at his mother's residence on two occasions.

In June 2006, Teresa, who was then twelve years old, spent the night at her paternal grandmother's house. Defendant was living in his mother's basement at that time. At the time in question, Teresa's grandmother had an upstairs bedroom, while another upstairs bedroom had been arranged for Teresa's use during her visit.

That afternoon, Defendant and his mother took Teresa shopping at a local store. During the shopping trip, Defendant bought Teresa a nightgown and robe, which she described as "really provocati[ve][,] kind of and showy." Upon returning to the paternal grandmother's home, the three of them ate dinner and decided to watch a couple of movies. Teresa changed into her new gown and robe prior to watching the movies.

Teresa, her grandmother, and Defendant watched the first of the two movies together. After the end of the first movie, Teresa's grandmother went upstairs to bed, while Defendant took a shower in the basement bathroom. Defendant emerged from the bathroom wearing only boxer shorts. At that point, Defendant sat next to Teresa on the couch and gradually moved closer to her. Teresa fell asleep during the movie.

After the end of the second movie, Defendant lay down beside Teresa and asked, "How bad do you think I can tear you up?" Defendant began kissing Teresa on the mouth and fondling and kissing her breasts. After moving her clothing aside, Defendant digitally penetrated Teresa's vagina and had vaginal intercourse with her. At some point during this incident, Defendant had Teresa perform oral sex on him. After the conclusion of this encounter, Defendant told Teresa "not to tell anybody or [they] would both go to jail."

Teresa did not tell anyone what Defendant had done to her for fear she would go to jail. Although Teresa continued to visit Defendant, she only did so when her grandmother was present. After she "felt sick and [] started throwing up," Teresa became concerned that she might be pregnant and reported the incident to Michelle Dayton, a sixth grade teacher, on 15 August 2006.

Ms. Dayton took Teresa to Janie Snyder, the school guidance counselor, who, in turn, contacted Teresa's mother. Ms. Snyder also reported the incident to the Yancey County Department of Social Services. As a result of contacts that DSS made with the Yancey County Sheriff's Office, Lieutenant Tom Farmer initiated an investigation of Teresa's allegations which resulted in the institution of criminal charges against Defendant.

B. Procedural History

On 16 August 2006, warrants for arrest were issued charging Defendant with first degree rape of a child, first degree sex offense with a child, taking indecent liberties with a child, and

incest with a child under age 13. On 23 October 2006, the Yancey County grand jury returned bills of indictment charging Defendant with first degree rape of a child, first degree sex offense with a child, taking indecent liberties with a child, and incest with a child under age 13.

The charges against Defendant came on for trial before the trial court and a jury at the 1 June 2009 criminal session of the Yancey County Superior Court. On 4 June 2009, a jury returned verdicts convicting Defendant of first degree rape, first degree sex offense, taking indecent liberties with a child, and incest with a child under age 13.

At the sentencing hearing, the trial court determined that Defendant had accumulated 10 prior record points and concluded that he should be sentenced as a Level IV offender. Based upon that determination, the trial court entered judgments sentencing Defendant to a minimum of 384 months and a maximum of 470 months in the custody of the North Carolina Department of Correction based upon his convictions for first degree rape of a child and first degree sex offense with a child, to a consecutive sentence of a minimum of 384 months and a maximum of 470 months in the custody of the North Carolina Department of Correction based upon his conviction for incest with a child under the age of 13, and to a consecutive sentence of a minimum of 25 months and a maximum of 30 months in the custody of the North Carolina Department of Correction based upon his conviction for taking indecent liberties with a child. In addition, the trial court ordered that, "upon

[his] release from imprisonment," Defendant "register as a sex offender" "for [his] natural life" and "enroll[] in [] satellite-based monitoring [] for [his] natural life." Defendant noted an appeal to this Court from the trial court's judgments.

II. Legal Analysis

In his only challenge to the trial court's judgments, Defendant contends that the trial court erred by allowing him to be separately convicted and sentenced for first degree rape of a child and incest with a child under age 13. More specifically, Defendant argues that, since statutory rape is a lesser-included offense of incest, the trial court's judgments violate the double jeopardy provisions of the federal and state constitutions. We do not believe that Defendant is entitled to appellate relief based on this contention.

"The constitutional prohibition against double jeopardy protects a defendant from 'additional punishment and successive prosecution' for the same criminal offense." *State v. Sparks*, 362 N.C. 181, 186, 657 S.E.2d 655, 658-59 (2008) (quoting *United States v. Dixon*, 509 U.S. 688, 696, 125 L. Ed. 2d 556, 568, 113 S. Ct. 2849 (1993)). As a general proposition, we review double jeopardy claims on a *de novo* basis. *State v. Hagans*, 188 N.C. App. 799, 804, 656 S.E.2d 704, 707, *disc. review denied*, 362 N.C. 511, 668 S.E.2d 344 (2008).

Although Defendant has vigorously pressed his double jeopardy claim on appeal, Defendant neglected to advance this argument in the trial court. For that reason, he has failed to properly

preserve his claim for appellate review, a fact that prohibits us from reviewing his challenge to the trial court's judgments. *State v. Wiley*, 355 N.C. 592, 615, 565 S.E.2d 22, 39 (2002), *cert. denied*, 537 U.S. 1117, 154 L. Ed. 2d 795, 123 S. Ct. 882 (2003) (stating that "[i]t is well settled that an error, even one of constitutional magnitude, that defendant does not bring to the trial court's attention is waived and will not be considered on appeal"; citing *State v. Smith*, 342 N.C. 531, 557-58, 532 S.E.2d 773, 790 (2000), *cert. denied*, 532 U.S. 949, 149 L. Ed. 2d 360 (2001)). Thus, we decline to review Defendant's double jeopardy claim on the merits.

Assuming for purposes of discussion that Defendant's double jeopardy claim had been properly preserved for appellate review, we would have been constrained from ruling in Defendant's favor based on the Supreme Court's decision in *State v. Etheridge*, 319 N.C. 34, 50, 352 S.E.2d 673, 683 (1987). In *Etheridge*, the Supreme Court concluded that a defendant's separate convictions and sentences for rape, incest, and taking indecent liberties with a minor, all of which stemmed from the same incident, did not result in a double jeopardy violation. *Id.* at 51, 352 S.E.2d at 683. In reaching this result, the Supreme Court held that each of the three were "legally separate and distinct crimes, none of which [was] a lesser included offense of another." *Id.* As a result, we believe that the issue that Defendant seeks to raise on appeal has already been decided adversely to his position by the Supreme Court, whose

decisions are, obviously, binding upon us. *Cannon v. Miller*, 313 N.C. 324, 324, 327 S.E.2d 888, 888 (1985).

Defendant attempts to distinguish *Etheridge* from this case by arguing that the Court's holding that incest was not a lesser-included offense of rape did not directly address his contention that rape is a lesser-included offense of incest. We do not find this argument persuasive, given that the Supreme Court specifically determined in *Etheridge* that neither offense was "a lesser included offense of" the other. *Etheridge*, 319 N.C. at 51, 352 S.E.2d at 683.

In addition, Defendant contends that we are not bound by *Etheridge* given that the General Assembly amended the statutory provisions relating to the crime of incest since *Etheridge* was decided.[2] According to Defendant, a review of the relevant statutory provisions "shows that *all* of the elements of the rape offense are included in the incest offense." For that reason, Defendant argues that he cannot be separately convicted and sentenced for rape and incest arising from the same incident. We disagree.

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[2] In support of his contention concerning the impact of the amendments to the rape and incest statutes, Defendant cites *State v. Ridgeway*, 185 N.C. App. 423, 648 S.E.2d 886 (2007). However, *Ridgeway* did not examine the question that we face in this case. Instead, *Ridgeway* ordered that judgment be arrested in one of two rape and sex offense cases in light of the fact that the defendant had been convicted of both forcible rape and sex offense and rape and sex offense based on the age of the victim as a result of the same incident, a set of circumstances which is clearly not analogous to the situation we are required to address here.

The Fifth and Fourteenth Amendments to the United States Constitution and Art. I, Section 19 of the North Carolina Constitution prohibit multiple punishments for the same offense arising out of a single transaction, unless the legislative branch clearly intended a contrary result. *Missouri v. Hunter*, 459 U.S. 359, 365, 74 L. Ed. 2d 535, 542, 103 S. Ct. 673, 678 (1983); *State v. Kemmerlin*, 356 N.C. 446, 474-75, 573 S.E.2d 870, 890 (2002). "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." *Blockburger v. United States*, 284 U.S. 299, 304, 76 L. Ed. 306, 309, 52 S. Ct. 180, 182 (1932). "If the lesser crime has an essential element which is not completely covered by the greater crime, it is not a lesser included offense," the determination of which is made on a definitional rather than a factual basis. *State v. Weaver,* 306 N.C. 629, 635, 295 S.E.2d 375, 378-79 (1982), *overruled in part on other grounds*, 334 N.C. 54, 61, 431 S.E.2d 188, 193 (1993).

N.C. Gen. Stat. § 14-178 (2009) provides, in pertinent part, that:

> (a) Offense.-- A person commits the offense of incest if the person engages in carnal intercourse with the person's (i) grandparent or grandchild, (ii) parent or child or stepchild or legally adopted child, (iii) brother or sister of the half or whole blood, or (iv) uncle, aunt, nephew, or niece.
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> (b) Punishment and Sentencing.--

> (1) A person is guilty of a Class B1 felony if either of the following occurs:
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> a. The person commits incest against a child under the age of 13 and the person is at least 12 years old and is at least four years older than the child when the incest occurred.
>
> b. The person commits incest against a child who is 13, 14, or 15 years old and the person is at least six years older than the child when the incest occurred.
>
> (2) A person is guilty of a Class C felony if the person commits incest against a child who is 13, 14, or 15 and the person is more than four but less than six years older than the child when the incest occurred.
>
> (3) In all other cases of incest, the parties are guilty of a Class F felony.

N.C. Gen. Stat. § 14-178(a)-(b). An individual is guilty of first degree rape if he or she engages in vaginal intercourse "[w]ith a victim who is a child under the age of 13 years and [a] defendant [who] is at least 12 years old and is at least four years older than the victim." N.C. Gen. Stat. § 14-27.2(a)(1) (2009). A careful examination of the language of N.C. Gen. Stat. § 14-178 demonstrates that the amendment to the incest statute upon which Defendant relies resulted in a reordering of the sentencing provisions applicable to an individual convicted of incest rather than a redefinition of the substantive offense. As a result, we believe that the clear legislative intent at the time that the incest statute was amended was to better define the aggravating and mitigating factors to be used in sentencing an individual convicted of incest rather than to create a number of separate and distinct

substantive offenses. Thus, under the currently effective statutory provisions relating to first degree rape and incest, guilt of the former requires proof of age as an essential element of the offense while guilt of the latter does not. In addition, proof of the familial relationship needed to support an incest conviction is not required in order to support a conviction of first degree rape of a child. For that reason, we are not persuaded that the amendments to the incest statute upon which Defendant relies require us to reach a different result than the Supreme Court did in *Etheridge*.

In his reply brief, Defendant argues, in reliance upon decisions such as *Apprendi v. New Jersey*, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000), and *Blakely v. Washington*, 542 U.S. 296, 159 L. Ed. 2d 403, 124 S. Ct. 2531 (2004), that the distinction between the definition of the offense and sentencing factors set forth above should not be accepted for purposes of evaluating his double jeopardy claim given that the age-related factors set out in N.C. Gen. Stat. § 14-178(b)(1)a were treated as elements for purposes of indictment and the trial court's instructions to the jury. Although the indictment returned against Defendant in the incest case referred to the ages of both Defendant and the victim and although the jury at Defendant's trial was instructed to find the ages of both the victim and Defendant "beyond a reasonable doubt" in considering the issue of Defendant's guilt, that fact is not conclusive for double jeopardy purposes. Given that double jeopardy analysis focuses upon the issue of

legislative intent and given the General Assembly's decision to label the provisions of the incest statute relating to the ages of the defendant and the victim as affecting "Sentencing and Punishment," we do not believe that there can be any reasonable doubt about the extent to which the General Assembly intended for individuals to be separately convicted and sentenced for both first degree rape and incest arising out of the same incident. Statutory language that is clear and unambiguous must be construed consistently with its plain meaning. *State v. Jackson*, 353 N.C. 495, 501, 546 S.E.2d 570, 574 (2001). As a result, had Defendant properly preserved this issue, we would have determined that Defendant's separate convictions and sentences for both first degree rape and incest did not have the effect of unlawfully placing him in jeopardy twice for the same offense despite the fact that the age-related components of N.C. Gen. Stat. § 14-178(b)(1)a must be alleged in any incest indictment and proven beyond a reasonable doubt based on Sixth Amendment considerations.

III. Conclusion

As a result, we conclude that Defendant is not entitled to appellate relief based on his sole challenge to the trial court's judgments. For that reason, the trial court's judgments should remain undisturbed.

NO ERROR.

Judges BRYANT and ELMORE concur.

Report per Rule 30(e).